

**AMERICAN ARBITRATION ASSOCIATION  
230 SOUTH BROAD STREET, 12<sup>TH</sup> FLOOR  
PHILADELPHIA, PA 19102-4106**

**Case No. 14 390 01526 12**

**In the Matter of Arbitration Between  
CITY OF PHILADELPHIA,**

**Employer**

**and**

**FRATERNAL ORDER OF  
POLICE, LODGE #5,**

**Union**

**OPINION  
AND  
AWARD**

**ARBITRATOR:**

Robert E. Light, mutually chosen  
by the parties pursuant to the  
rules and regulations of the  
American Arbitration Association

**HEARING:**

July 2, 2013 in Philadelphia, PA.  
A stenographic recording of the proceeding  
and thereafter both counsel filed  
post-hearing briefs

**APPEARANCES:**

For the City

Joshua A. Brand, Esq., Asst. City Solicitor  
Charles Ramsey, Police Commissioner

For the Association

Marc L. Gelman, Esq. (Jennings, et als)  
John McGrody, FOP Representative  
Albert Phipps, Grievant

**ISSUE:**

Was there just cause for the termination of Albert  
Phipps? If not, what shall be the remedy?

## **BACKGROUND**

A hearing in this matter was held on July 2, 2013 in Philadelphia, Pennsylvania with both sides present and duly represented by counsel and where both parties were afforded full and complete opportunity to offer evidence and argument in support of their respective contentions. A stenographic record of the proceedings was taken, and as was arranged at the hearing, both counsel thereafter filed post-hearing briefs, after which time the hearing was declared closed.

The City of Philadelphia (hereinafter the “City”) and FOP Lodge No. 5 (hereinafter the “Union” or the “FOP”) are signatories to a current collective bargaining agreement. A grievance was filed by bargaining unit member Albert Phipps, a police officer, who was terminated by the City for Conduct Unbecoming, Section 1-§009-10, (lying or attempting to deceive regarding a material fact during the course of a Departmental investigation); Conduct Unbecoming, Section 1-§011-10 (abuse of authority); Conduct Unbecoming, Section 1-§018-10 (sexual behavior while on duty); and Conduct Unbecoming, Section 1-§021-10 (any incident, conduct or course of conduct which indicates that an employee has little or no regard for his/her responsibility as a member of the Police Department). The matter was grieved by the Union on behalf of Officer Phipps; it proceeded through the course of the grievance procedure and when there was no resolution it was submitted to arbitration, under the auspices of the American Arbitration Association, from whose panel of arbitrators the undersigned was duly chosen.

## **FACTS**

As is not unusual in these kinds of cases, the facts in this matter are in dispute. The incident which led to the grievant’s termination occurred on grievant’s 10:30 p.m. – 6:30 a.m. shift where Officer Phipps was working in the Ninth District Police Station that evening being assigned the “turnkey” on that shift. His duties included making periodic checks of the various

cells where prisoners were incarcerated. In fact, by directive, the “turnkey” was supposed to monitor the cells every [REDACTED] minutes.

A woman by the name of A [REDACTED] B [REDACTED] was arrested and brought into the Ninth District Police Station on the afternoon of December 2, 2011 on shop lifting charges. Although there is some dispute with respect to the number of women in the cell in which Ms. B [REDACTED] was placed, nevertheless it appears that at least one woman was with her at a time. At the hearing, Ms. B [REDACTED] testified with respect to what occurred while in that cell that day. Specifically, she stated that about 3:00 a.m. the grievant walked into her cell, turned her around, told her to pull her pants down and began “grinding” or rubbing up against her. He then turned her so that she was facing him and began sucking on her right breast, and also used his hands to spread open her vagina. According to her testimony, the incident lasted approximately five minutes before the cellmate made a sound at which point the grievant left Ms. B [REDACTED]’s cell.

She stated that she was fearful of making a report of the incident while she was still in custody and that she was released therefrom at around 5:00 a.m. on December 3, 2011, reporting the incident to Police Internal Affairs sometime shortly thereafter. She was asked if she would allow her bra and other articles of her clothing to be tested for DNA evidence, to which she agreed. DNA testing was done and it confirmed that evidence was found on the inside right cup of Ms. B [REDACTED]’s bra which matched the DNA of the grievant. Based thereon, in addition to the testimony of Ms. B [REDACTED], it was determined that the grievant sexually assaulted Ms. B [REDACTED] on that day.

It is noted that Ms. B [REDACTED] appeared and testified in great detail at the hearing. Commissioner Ramsey who likewise testified stated that he reviewed the report that was done,

considered the grievant's prior record and that he dismissed the grievant by the Commissioner's Direct Action.

At the hearing, Police Officer Phipps testified in his own behalf. He stated that his interaction with Ms. B [REDACTED] during the evening was uneventful and that at no point in time did he enter her cell. He stated that his only interaction with her was that initially she asked him if she could make a phone call to her mother in order to check on her daughter; a subsequent contact with her was her questioning him about the status of her detention and how long she was going to remain locked up; and that was it — specifically the grievant stated that he did not enter her cell at any point in time.

Commissioner Charles H. Ramsey testified that he considered the entire record in this case and he determined to discharge the grievant based upon the seriousness of the charge involved and his past history. He stated that he relied upon the Internal Affairs investigation and that this act was serious enough for him to assess the penalty of discharge which he did.

### **DISCUSSION**

The arbitrator has carefully weighed all the evidence in the case including the testimony of the witnesses at the hearing, the arguments of respective representatives of the parties as set forth both at the hearing and in their briefs, the contract and the exhibits prior to reaching his decision. Initially, the arbitrator notes that this is a classic case of credibility, with the City urging the arbitrator to accept Ms. B [REDACTED]'s version of what transpired as distinguished from that of the grievant who, in reality, stated that nothing at all happened that day and that he never had any sexual contact with Ms. B [REDACTED]. Therefore, credibility findings of necessity come into play here and the arbitrator has endeavored to find the truth and to make the necessary credibility findings in order to properly resolve this matter.

Assessing credibility is no easy task for arbitrators to perform and where, as here, portions of the testimony are in such direct conflict that task becomes all the more difficult. However, of necessity, credibility findings have had to be made so that the arbitrator utilized those kinds of tests in order to ascertain credibility namely, the demeanor of the witnesses as they testified, the reasonableness of the stories that were told, the existence of conflicts with other assertions of fact, and the simple plausibility of the grievant's story when weighed against ordinary experience and common sense.

In evaluating a witness's credibility, arbitrators look at the following factors:

- (1) Interest or lack of interest in the outcome of the case;
- (2) The relationship to the party;
- (3) The ability and opportunity to know, remember, and relay the facts;
- (4) The manner and appearance;
- (5) The age and experience;
- (6) The frankness and sincerity, or lack thereof;
- (7) The reasonableness or unreasonableness of the testimony in light of all the other evidence in the case;
- (8) Any impeachment of the testimony; and
- (9) Any other factors that bear on believability and weight.

As Union counsel properly points out, this is a classic case of a "he said/she said" situation, and that the arbitrator's determination of truthfulness will undoubtedly control the ultimate resolution of the grievance. While the Union, of course, believes that Ms. B [REDACTED]'s testimony is not believable while that of the grievant is, the arbitrator respectfully disagrees. On the contrary, her testimony, in conjunction with the DNA evidence must, of necessity, lead to

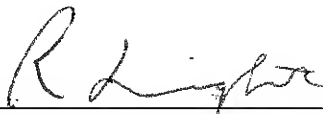
the conclusion herein. Specifically, the arbitrator notes that the bra that Ms. B [REDACTED] was wearing on December 3, 2011 was submitted for DNA analysis after she was interviewed by IAD, and the grievant's DNA was identified on the inside right cup of her bra, thus corroborating Ms. B [REDACTED]'s allegations. At the hearing, K [REDACTED] K [REDACTED] of the Police Forensics Science Division, testified respecting the DNA procedures. As was properly argued by City counsel, "The corroborative DNA evidence introduced by the City greatly bolsters the credibility of Ms. B [REDACTED]'s testimony and at the same time casts great doubt on the grievant's testimony that he never went into Ms. B [REDACTED]'s cell and engaged her in sexual acts." The arbitrator finds that statement to be accurate. Moreover, Ms. B [REDACTED]'s testimony at the hearing was consistent with the statement she gave to Internal Affairs just two days after the incident occurred and the arbitrator finds her testimony in that regard to be credible.

The last item in this case involves the propriety of the discipline imposed. At the hearing, Commissioner Ramsey testified respecting that issue and that the grievant's conduct represented a flagrant disregard of his fundamental duty to "protect and serve," and was an abuse of power. Under the Police Department Disciplinary Code, he pointed out that each of the charges for which the grievant was dismissed are punishable by dismissal for a first offense. Based upon the evidence in this case which included the testimony of Ms. B [REDACTED] the DNA evidence; the false statement of the acts which the grievant committed to IAD; as well as the text messages which he sent to Ms. B [REDACTED] leaves this arbitrator no other alternative than to find that the City had just cause for the discharge of Police Officer Phipps and he will not disturb the City's action in that regard.

Therefore, the undersigned having duly heard all of the proofs and allegations of the parties to this proceeding makes the following administrative award:

**AWARD**

There was just cause for the discharge of Police Officer Albert Phipps. Grievance denied.



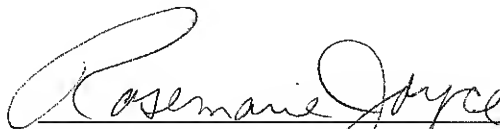
**ROBERT E. LIGHT, ARBITRATOR**

State of New Jersey:

SS

County of Somerset:

On this 22<sup>nd</sup> day of November 2013 before me personally came and appeared ROBERT E. LIGHT to me known and known to me to be the individual described in and who executed the foregoing instrument and acknowledged to me that he executed the same.



**ROSE JOYCE  
NOTARY PUBLIC STATE OF NEW JERSEY  
MY NOTARY EXPIRES JULY 24, 2017**